EUGENE V. SIMONS, ET AL.

IBLA 96-476 Decided June 23, 1999

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, dismissing protest to production royalty rate for sodium preference right leases. WYW-9026 and WYW-9027.

Affirmed.

1. Sodium Leases and Permits: Preference Right Leases--Sodium Leases and Permits: Royalties

When the holder of a sodium prospecting permit applying for a preference right lease is found to have shown a discovery of a valuable deposit of sodium on the lands prior to the expiration of the prospecting permit and that the permitted lands are chiefly valuable therefor, BLM is required to issue a preference right lease to the applicant. The royalty term of a sodium preference right lease is governed by the Department's obligation to obtain fair market value for the leased resource, and a decision setting the royalty rate at 8 percent is properly affirmed when the record supports a finding that this royalty rate constitutes fair market value at the time the lease is issued.

2. Estoppel--Sodium Leases and Permits: Preference Right Leases--Sodium Leases and Permits: Royalties

Affirmative misconduct in the form of a misrepresentation of fact in a written BLM decision is generally required to establish a claim of estoppel. Providing proposed lease terms to a sodium preference right lease applicant at the time of requiring a "final showing" of a discovery of a valuable deposit of sodium does not constitute a representation by BLM that it will be bound to a royalty rate of 5 percent when a discovery is finally established on the record and a lease is issued. Thus, BLM is not equitably estopped from imposing a royalty rate of 8 percent on a newly-issued sodium preference right lease when the record supports a finding that this rate represents fair market value at the time the lease is issued.

APPEARANCES: Thomas L. Sansonetti, Esq., Cheyenne, Wyoming, for appellants; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Eugene V. Simons, Jewell W. Simons, Julianne Simons, and Jeffrey D. Simons have appealed from a decision of the Wyoming State Office (WYSO), Bureau of Land Management (BLM), dated June 13, 1996, dismissing their protest of the 8-percent royalty rate incorporated in the terms of sodium preference right leases, WYW-9026 and WYW-9027. The leases were issued to them effective July 1, 1996, in response to preference right lease applications (PRLA's). 1/

An understanding of the issues raised by this appeal is facilitated by a knowledge of the factual background preceding issuance of the leases. Applications for sodium prospecting permits (Nos. W-9026 and W-9027) were filed in October 1967 and prospecting permits were issued effective December 1, 1968. Based on exploration activities conducted pursuant to the prospecting permits, the PRLA's were filed during the 2-year term of the permits alleging a discovery of valuable deposits of sodium (trona) subject to lease under the terms of section 24 of the Mineral Leasing Act, as amended, 30 U.S.C. § 262 (1994). The lease applications had a long history of adjudication by the Department prior to lease issuance. Two different decisions by BLM rejecting the lease applications were set aside by the Board and referred to an administrative law judge for an evidentiary hearing. John S. Wold, 48 IBLA 106 (1980) (Wold I), and John S. Wold, 95 IBLA 69 (1986) (Wold II). After a hearing, Administrative Law Judge John R. Rampton, Jr., found Eugene V. Simons entitled to issuance of the sodium mineral leases pursuant to the PRLA's. This decision was affirmed by the Board on appeal. BLM v. Simons, 128 IBLA 99 (1993). 2/ Issuance of the leases by BLM was further delayed subsequent to the latter decision. See Simons v. BLM, 135 IBLA 125 (1996).

Finally, in a decision dated May 3, 1996, BLM tendered the preference right leases to appellants for execution subject to certain conditions. A production royalty schedule attached to the leases provided that the royalty rate would be 8 percent of the gross value of production, in accordance with the policy directive regarding new sodium leases contained in a February 22, 1996, Memorandum from the Assistant Secretary for Land and Minerals Management to the State Director, Wyoming, BLM. This represented

1/ On Sept. 26, 1997, we were notified by BLM that it had, by decision dated Aug. 27, 1997, approved assignments of 100 percent of the record title interests in the two leases to the International Trona Partnership, Ltd.

2/ A petition for reconsideration of the Board's December 1993 decision was denied by order of the Board dated Jan. 17, 1995.

a change from the 5-percent royalty rate which had been charged on Federal sodium leases for a long period of time. See Attachment 5 to BLM Answer. The Assistant Secretary's memorandum provided, in relevant part, that:

> It is the policy of the Department of the Interior that all new sodium leases issued after February 19, 1996, for public lands within the Green River Basin in the state of Wyoming, [3/] shall require the payment by the lessee of a production royalty of 8 percent of the quantity or gross value of the output of sodium compounds and other related products[.]

(Memorandum to State Director from Assistant Secretary, dated Feb. 22, 1996, at 3.)

Appellants executed the leases in May 1996 and returned them to BLM where they were signed on behalf of BLM in June 1996. 4/ On May 24, 1996, appellants filed a protest, specifically objecting to the higher royalty rate. The protest noted that the prior 5-percent royalty rate was prevailing on Federal sodium leases both at the time the PRLA's were filed and at the time the Board affirmed entitlement to the leases in its 1993 decision.

In its June 1996 decision, BLM dismissed appellants' protest. As a basis for the decision, BLM cited the Secretarial policy quoted above. Appellants appealed from that decision, challenging only BLM's decision to dismiss their protest of the production royalty rate.

In their statement of reasons for appeal (SOR), appellants contend that they are entitled to issuance of preference right leases containing the production royalty rate which was "in effect" at the time their entitlement to the leases was established, noting that issuance of a lease is no longer discretionary once compliance with the statutory criteria is established by a prospecting permittee. Appellants contend they became entitled to leases on December 20, 1993, when the Board issued its final decision in BLM v. Simons. (SOR at 4.) They argue that, at that time, issuance of the leases was mandated by section 24 of the Mineral Leasing Act, citing Natural Resources Defense Council, Inc. (NRDC) v. Berklund, 458 F. Supp. 925 (D.D.C. 1978), aff'd, 609 F.2d 553 (D.C. Cir. 1979), since appellants had established, to the satisfaction of the Secretary,

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3/ In 1991, almost 87 percent of the soda ash (the primary by-product of sodium production) produced in the entire United States came from the Green River Basin (GRB) in southwestern Wyoming. (Memorandum to Director, BLM, from Wyoming State Director, dated Oct. 9, 1992, Attachment 3 to Answer, at 1.)

4/ The leases covered 4,706.29 acres of public land situated in Ts. 15 and 16 N., R. 107 W., and T. 15 N., R. 108 W., Sixth Principal Meridian, Sweetwater County, Wyoming, mostly within the Flaming Gorge National Recreation Area, which is administered by the Forest Service. These lands are within the GRB.

compliance with the statutory prerequisites for lease issuance. Appellants further cite NRDC v. Berklund for the principle that the royalty rate, as well as the other lease terms, is crucial to determining whether they have discovered a valuable deposit of sodium (and that the permitted lands are chiefly valuable therefor), and thus to deciding their entitlement under the Mineral Leasing Act, and that, using a rate set well after that determination was finally made in the Board's December 1993 decision "would render meaningless the entire process of proving a * * * discovery." (SOR at 4.)

Appellants assert this case is distinguishable from the case of Utah International, Inc. v. Andrus, 488 F. Supp. 962, 967 (D. Utah 1979) (1979 Utah International) in which the applicant was found not to be entitled to a preference right lease on the ground it had not established a vested right by meeting the commercial quantities standard at the time the new regulations became effective. Further, appellants contend this case is properly distinguished from Utah International, Inc. v. Andrus, 488 F. Supp. 976, 987 (D. Colo. 1980) (1980 Utah International), in which the court held the applicant was entitled to a preference right lease by virtue of its showing and the resulting Departmental adjudication under the former procedures, but recognized that the Secretary was obligated to apply subsequent statutory and regulatory authority in conditioning the exercise of lease rights. Specifically, appellants argue that the applicants in this case were required to demonstrate "the discovery of a valuable deposit of sodium and that the lands covered by the Leases are chiefly valuable therefor in light of the costs of compliance with the specific lease terms established by BLM." (SOR at 5.) In support of the distinction, appellants have noted a decision dated March 22, 1983, issued by BLM to their predecessor-in-interest in the PRLA's requiring a final showing 5/ of a valuable discovery of sodium on the permits and "transmitting the proposed leases with stipulations attached" to be addressed in the final showing. (Ex. H to SOR.) The proposed leases provided for a royalty rate of 5 percent. (Exs. D, E to SOR.)

Appellants also argue that the unreasonable delay in issuance of the leases should preclude BLM from imposing an 8-percent royalty rate. (SOR at 6.) Appellants note that the applicable sodium lease royalty rate was 5 percent in 1993 when the Board issued its decision holding that Eugene V. Simons was entitled to preference right leases. Finally, appellants contend that BLM should be estopped from changing the royalty rate from that

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5/ As we noted in Wold II, 95 IBLA at 70, n.1, the regulation in effect at the time, 43 C.F.R. § 3521.1-1 (1981), divided the required showing by a prospecting permittee applying for a preference right lease into two components, an initial showing (43 C.F.R. § 3521.1-1(b)) including data regarding the quantity and quality of minerals discovered on the permit and a final showing (43 C.F.R. § 3521.1-1(c)) submitted after an environmental analysis has been prepared including detailed data on estimated revenues and costs of mining, removing, and marketing the mineral.

set forth in the proposed leases presented to the lease applicant prior to the final showing in support of a discovery of a valuable deposit of sodium.

In its answer, BLM points out that revision of the royalty rate for sodium leases has been under consideration by the Department since 1992, prior to the time the Board issued its decision on appeal holding Simons entitled to the sodium leases. It is asserted by BLM that the last 5-percent royalty lease was issued in 1988. It is contended by BLM that a showing of a discovery of a valuable deposit of sodium within the bounds of a prospecting permit entitling the applicant to a preference right lease does not deprive the Secretary of his discretion to include in the lease terms provisions deemed required in the public interest. (Answer at 6.) Further, BLM points out that the Secretary is required by law to ensure that the United States receive "fair market value" for the use of the public lands and their resources. 43 U.S.C. § 1701(a)(9) (1994). Thus, BLM notes that the Assistant Secretary's February 22, 1996, memorandum constitutes a finding that an 8-percent royalty rate for new sodium leases reflects the fair market value of the resources to be leased. (Answer at 10.)

Regarding the reasonableness of the delay in lease issuance, it is pointed out by BLM that most of the delay since the PRLA's were filed involved the time required to allow the applicants to make a showing of a valuable discovery. With respect to the period after January 1995 when the petition for reconsideration was denied, BLM contends that a 5-percent royalty lease would not have been issued as it was clear that this did not reflect the fair market value, and a higher royalty rate was required in the public interest. Id. at 14. Further, BLM asserts that the grounds for a finding of estoppel are lacking. It is pointed out by BLM that Board precedent follows the judicial decisions requiring affirmative misconduct in the form of critical misstatement in an official decision. Id. at 20. It is contended that no misstatement was made in any BLM decision. Id.

Additionally, BLM notes that while a 5-percent royalty may have been considered to reflect the fair market value of sodium deposits in 1983 when the applicants were invited to tender a final showing in support of a discovery, the record does not support a finding that this was the case in 1993 when the Board issued its decision. It is also noted by BLM that there was no regulation setting a royalty rate of 5 percent during this period. Rather, the relevant regulations provided that royalty rates are to be determined on an individual lease basis.

[1] Section 24 of the Mineral Leasing Act governing issuance of sodium leases for lands embraced in sodium prospecting permits provides, in relevant part, that:

> Upon showing to the satisfaction of the Secretary of the Interior that valuable deposits of [sodium] * * * have been discovered by the permittee within the area covered by his permit

> and that such land is chiefly valuable therefor, the permittee shall be entitled to a lease for any or all of the land embraced in the prospecting permit at a royalty of not less than 2 per centum of the quantity or gross value of the output of sodium compounds and other related products[.]

30 U.S.C. § 262 (1994). The relevant implementing regulation has long contained provisions to the same effect. 43 C.F.R. § 3523.3 (formerly 43 C.F.R. § 3520.1-1(a) (1985)).

It is now well established that, upon making a satisfactory showing to the Secretary that a valuable deposit of sodium has been discovered (and that the permitted lands are chiefly valuable therefor), BLM is required to issue a preference right lease to the prospecting permittee. NRDC v. Berklund, 609 F.2d at 557-58 (coal PRLA). 6/ On this, both BLM and appellants agree. (Answer at 6; SOR at 3-4.) The issue before us is whether appellants are entitled to issuance of leases at the 5-percent royalty rate prevailing at the time they were found to be entitled to leases.

The 1980 Utah International case involved a coal PRLA filed prior to repeal of the coal prospecting permit and preference right lease provisions of the Mineral Leasing Act subject to valid existing rights. The PRLA was based on a showing of a discovery of commercial quantities of coal made during the life of a prospecting permit. Noting that BLM had found in 1970 that the applicant had shown the existence of a deposit of commercial quantities of coal under the existing standard, the court applied the precedent of NRDC v. Berklund and held that BLM had no discretion to readjudicate this application several years later pursuant to a new revised policy regarding the showing required to establish a deposit of commercial quantities of coal. 488 F. Supp. at 984. While recognizing applicant's entitlement to issuance of a lease established under the former standard for commercial quantities of coal, the court found that a lease would be properly subject to revised regulations and new statutory authority governing lease terms. 488 F. Supp. at 987. Appellants seek to distinguish this precedent on the ground that the royalty rate set forth in the proposed lease terms set forth by BLM in 1983 when requesting a final showing in support of the PRLA's contained a 5-percent royalty rate in accordance with the policy at the time. It is true we held in BLM v. Simons, 128 IBLA

6/ The NRDC case and both Utah International cases involved coal PRLA's, filed pursuant to section 2(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 201(b) (1972) (repealed by section 4 of the Federal Coal Leasing Amendments Act of 1976, Pub. L. No. 94-377, 90 Stat. 1085 (1976)). The relevance of these precedents to the present case stems from the similarity of the statutory leasing structure for coal prior to the 1976 Act (i.e., discretionary issuance of prospecting permits and entitlement to a preference right lease upon a showing of discovery of a valuable deposit) to the sodium leasing provisions.

at 103, that the issue of the discovery of a valuable deposit of sodium properly considers the evidence as of the date on which the "applicants fulfilled all the prerequisites for determining their entitlement to a sodium preference right lease, i.e., at the expiration of their prospecting permits" (quoting from Yankee Gulch Joint Venture v. BLM, 113 IBLA 106, 134 (1990)). While a 5-percent royalty rate was properly considered in adjudicating whether there was a valuable deposit of sodium, this does not mean that a lease issued several years later after a lengthy period of adjudication is required to be issued at the royalty rate which the Department determined to be reasonable at the time the prospecting permits expired.

Neither the statute nor the regulations fix a certain production royalty rate for sodium preference right leases. Rather, they establish a floor rate of 2 percent, below which the adopted rate cannot fall. 30 U.S.C. § 262 (1994); 43 C.F.R. § 3521.2-2. Nor do they provide the basis for establishment of that rate. Rather, the regulations have consistently provided that the royalty rate is to be determined "on an individual case basis," prior to issuance of a lease. 43 C.F.R. § 3503.2-1; 43 C.F.R. § 3503.3-2(a) (1985). Thus, no specific rate was "in effect," as a matter of statute or regulation, at the time of the Board's December 1993 decision in BLM v. Simons, or earlier. (SOR at 10.)

Royalty for a lease granting the right to produce minerals from the public lands, as BLM recognizes, is to be set at the rate which provides the United States with the "fair market value" of the sodium resources produced from the leased lands. (Answer at 8 (quoting from 43 U.S.C. § 1701(a)(9) (1994)); see California Co. v. Udall, 296 F.2d 384, 387-88 (D.C. Cir. 1961) (oil and gas leases); Stauffer Chemical Co., 49 IBLA 381, 389 (1980), aff'd sub nom., Monsanto Co. v. Watt, No. 81-4013 (D. Idaho March 8, 1985), aff'd, 827 F.2d 483 (9th Cir. 1987) (phosphate leases).) As the court stated in Mountain States Legal Foundation v. Andrus, 499 F. Supp. 383, 392 (D. Wyo. 1980) (citing California Co. v. Udall, 296 F.2d at 388): "The Mineral Leasing Act was intended * * * to obtain for the public reasonable financial returns on assets belonging to the public."

The record before us indicates that by April 1992 BLM officials had concluded that a royalty of 5 percent was not reflective of fair market value and were proposing an increase in the royalty rate to 8 percent. (Memorandum of April 2, 1992, from District Manager to State Director, Attachment 1 to Answer.) A memorandum of September 4, 1992, from the State Director to the Director, BLM, noted a "current private royalty rate for leases of eight percent" and concluded that "a royalty rate of five percent appears to be providing the government with less than fair market value for its trona resources." (Attachment 2 to Answer at 1.) The memorandum noted that mineral ownership in the GRB was dominated by the Union Pacific (UP) Railroad and the Federal Government in a checkerboard pattern of alternating sections and, further, that UP had charged a royalty

of 8 percent in its private sodium leases since 1978. Id. at 2. Subsequently, the Assistant Secretary, Land and Minerals Management, issued his February 1996 Memorandum to the Wyoming State Director, BLM, in which he noted that:

> The WYSO has prepared a detailed analysis of existing and alternative royalty rates for sodium minerals produced in the GRB of Wyoming. The WYSO recommended that all new sodium leases hereafter issued on public lands in Wyoming should require the lessee to pay a production royalty of 8 percent. This 8 percent rate would apply during the 20-year lease term, but could be readjusted thereafter. The WYSO's analysis shows that an 8 percent royalty rate represents the fair market value for new sodium leases. As sodium producers in Wyoming have opened new mining operations and expanded existing mining facilities on non-federal leases, a standard royalty rate of 8 percent for new sodium leases has been established over the past 20 years. This 8 percent royalty rate has been accepted on non-federal lands by every federal sodium lessee that produces sodium products in Wyoming.

(Attachment 8 to Answer at 2.) Accordingly, we find that the record supports the BLM finding that a royalty rate of 8 percent is reasonably set to ensure receipt of fair market value.

With respect to the reasonableness of the delay in issuance of the leases as it relates to the royalty rate, we note that, as BLM has pointed out, the greatest part of the delay has been necessitated in order to allow the lease applicant to present the evidence required to establish a discovery of a valuable deposit of sodium supporting entitlement to preference right leases. By the time that this had finally been resolved in the Board's December 1993 decision and the January 1995 order denying the petition for reconsideration, it is clear from the record that BLM had determined that the 5-percent royalty rate no longer reflected a return of fair market value on the leased sodium. Accordingly, we conclude that the delay was not unreasonable in view of the fact that the Department was at the time engaged, with the assistance of input from the sodium industry, the State, and the public, in determining the appropriate royalty rate for sodium leases in the GRB, and thus was engaged in a good faith effort to advance the public interest "in obtaining a fair return for [F]ederally owned [sodium]." 1979 Utah International, 488 F. Supp. at 974. Thus, we do not find that the delay was unreasonable, especially since it did not affect appellants' entitlement to leases, but only the terms of leasing. Id.; Peterson v. Department of Interior, 510 F. Supp. 777, 782-83 (D. Utah 1981) (coal prospecting permit); see Yankee Gulch Joint Venture, 84 IBLA 353, 358 (1985) (sodium preference right lease).

[2] With regard to the claim of estoppel, it is well recognized that in order for estoppel to lie against the United States, it must be demonstrated that the conduct of BLM rises to the level of affirmative misconduct such that it affirmatively misrepresents to the appellant or conceals

from him a material fact. Hugh D. Guthrie, 145 IBLA 149, 153 (1998), citing United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979). Further, in accordance with the U.S. Supreme Court holding in Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 65 (1984), we have held that the affirmative misconduct must consist of a crucial misstatement by BLM in a written decision. David E. Best, 140 IBLA 234, 236 (1997); James W. Bowling, 129 IBLA 52, 55 (1994); Double J Land & Cattle Co., 126 IBLA 101, 107 (1993), aff'd in part, rev'd in part on other grounds, Double J. Land & Cattle Co. v. U.S. Department of Interior, 91 F.3d 1378 (10th Cir. 1996).

Appellants note that the 5-percent royalty rate contained in the terms of the proposed leases submitted to their predecessors-in-interest in March 1983 was used as a basis for preparing their final showing regarding discovery of a valuable deposit. Reference to the BLM decision which transmitted the proposed leases and required submission of a final showing, however, discloses it made no representation that the royalty rate for the leases would be 5 percent regardless of the length of time it took to establish the right to leases and regardless of whether that royalty rate constituted fair market value for the leased sodium at the time the leases issued. Further, to the extent that the applicants treated the proposed royalty rate as a representation of fact regardless of the situation at the time of lease issuance, such reliance was unreasonable.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

David L. Hughes
Administrative Judge